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UNITED STATES DISTRICT COURT

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DISTRICT OF NEVADA

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ANTHONY CALCAGNO,

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9

Plaintiff,

)

10

v.

3:13-cv-259-RCJ-VPC

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GAMING ENTERTAINMENT (NEVADA)
LLC, FULL HOUSE RESORTS, INC., RICK
MARRICK

ORDER

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Defendants.

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Currently before the Court are Full House Resorts, Inc.'s Motion to Dismiss Plaintiff's Complaint (#4) and Full House Resorts, Inc.'s Renewed Motion to Dismiss Defendant Full House Resorts, Inc. and Plaintiff's Fourth Claim for Relief (#11).

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BACKGROUND

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I. Procedural History

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On May 20, 2013, then *pro se* Plaintiff Anthony Calcagno filed a complaint against Grand Lodge Casino-Full House Resorts, Inc. and Rick Marrick. (Compl. (#1) at 1). On June 20, 2013, Full House Resorts, Inc. filed a motion to dismiss the complaint and indicated that they were erroneously sued as "Grand Lodge Casino-Full House Resorts Inc." (Mot. to Dismiss (#4) at 1).

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On July 8, 2013, Plaintiff, now counseled, filed a First Amended Complaint ("FAC") against Defendants Gaming Entertainment (Nevada), LLC; Full House Resorts, Inc.; and Rick Marrick. (FAC (#9) at 1). On July 22, 2013 Defendant Full House Resorts, Inc. filed a

1 renewed motion to dismiss the FAC.¹ (Renewed Mot. to Dismiss (#11) at 1).

2 **II. First Amended Complaint (“FAC”)**

3 In the FAC, Plaintiff sued Defendants Gaming Entertainment (Nevada), LLC (“GEN”);
 4 Full House Resorts, Inc. (“FHR”); and Rick Marrick (collectively “Defendants”). (FAC (#9) at
 5 1). Plaintiff alleged the following. (*Id.* at 2). Rick Marrick, Plaintiff’s direct supervisor, was an
 6 employee of GEN and/or FHR. (*Id.*). Plaintiff had worked at the Hyatt Lake Tahoe as a 21
 7 dealer before GEN and FHR began owning and operating the casino. (*Id.*). Plaintiff was over
 8 the age of 40 years old and was Caucasian. (*Id.*). After GEN and FHR began operating the
 9 Hyatt, several card dealers over the age of 40 years old had been “systematically terminated
 10 from employment and replaced with younger workers.” (*Id.*). “Younger workers were typically
 11 given preferential treatment by Defendants in various aspects of the terms and conditions of
 12 employment.” (*Id.*).

13 The FAC alleged the following. (*Id.* at 3). After GEN and FHR began operating the
 14 Hyatt, several Hispanic employees were hired to work there and were “typically given
 15 preferential treatment by Defendants in various aspects of the terms and conditions of
 16 employment.” (*Id.*). On December 27, 2011, Plaintiff arrived at work and went to eat in the
 17 employee cafeteria before his shift began. (*Id.*). While getting his meal, he asked the
 18 Hispanic cafeteria worker for salad dressing and the cafeteria worker refused. (*Id.*). Plaintiff
 19 left the cafeteria without eating and “remarked to another dealer in the cafeteria that the
 20 worker was being lazy, and was not doing her job.” (*Id.*). Plaintiff went to his assigned table
 21 and dealt cards for approximately 20 minutes before being suspended pending an
 22 investigation into what he had said to the cafeteria worker. (*Id.*).

23 The FAC alleged the following. (*Id.*). Two days later, Defendant Rick Marrick contacted
 24 Plaintiff and asked Plaintiff to meet with him that afternoon at the Hyatt. (*Id.*). At the meeting,
 25 Marrick and the human resources representative, Kat Smith, were unable to tell Plaintiff what
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27 ¹ In light of the FAC and Defendant Full House Resorts, Inc.’s renewed motion to
 28 dismiss the FAC, this Court denies Defendant Full House Resorts, Inc.’s motion to dismiss the
 original complaint (#4) as moot.

1 he allegedly said to the cafeteria worker. (*Id.*). Marrick and Smith “did not confirm speaking
2 with any of [Plaintiff’s] witnesses present in the cafeteria.” (*Id.*). Smith provided Plaintiff with
3 his final paycheck which was handwritten and without any information regarding his
4 deductions. (*Id.*). Plaintiff was instructed to “never step foot in the Hyatt again” and did not
5 receive any other documentation at the termination meeting. (*Id.* at 4). Prior to his termination
6 meeting, Plaintiff had no adverse employment actions, write ups, suspensions, or counseling
7 for poor performance. (*Id.*).

8 The FAC alleged the following. (*Id.*). Plaintiff filed a claim with the Nevada Equal
9 Rights Commission (“NERC”) and received a right to sue letter on February 21, 2013. (*Id.*).
10 Plaintiff was unable to find employment in any other Northern Nevada casinos for 18 months.
11 (*Id.*). In one of Plaintiff’s job interviews, the interviewer asked Plaintiff for the details of his
12 history with the Hyatt and the underlying dispute, although Plaintiff had not yet filed his case
13 and there were no public records about the dispute. (*Id.*). Plaintiff believed that Defendants
14 had intentionally prevented his employment as a dealer when prospective employers
15 contacted them. (*Id.*). Plaintiff believed that, in the process of preventing his employment,
16 Defendants had defamed his character and abilities. (*Id.*).

17 The FAC alleged five causes of action. (*Id.* at 5-6). In the first cause of action, Plaintiff
18 alleged age discrimination in violation of the Age Discrimination in Employment Act (“ADEA”).
19 (*Id.* at 5). In the second cause of action, Plaintiff alleged defamation. (*Id.*). In the third cause
20 of action, Plaintiff alleged negligent infliction of emotional distress (direct theory). (*Id.*). In the
21 fourth cause of action, Plaintiff alleged a violation of Title VII of the 1964 Civil Rights Act based
22 on national origin. (*Id.* at 6). In the fifth cause of action, Plaintiff alleged intentional
23 interference with prospective economic advantage. (*Id.*).

24 The pending motion now follows.

LEGAL STANDARD

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must accept as true all factual allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th

1 Cir. 2000). Such allegations must be construed in the light most favorable to the nonmoving
 2 party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the court
 3 should only look to the contents of the complaint during its review of a Rule 12(b)(6) motion
 4 to dismiss. However, the court may consider documents attached to the complaint or referred
 5 to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First Boston*
 6 *Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

7 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a
 8 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th
 9 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant
 10 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,
 11 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does
 12 not need detailed factual allegations; rather, it must plead “enough facts to state a claim to
 13 relief that is plausible on its face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022
 14 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,
 15 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949,
 16 173 L.Ed.2d 868 (2009) (stating that a “claim has facial plausibility when the plaintiff pleads
 17 factual content that allows the court to draw the reasonable inference that the defendant is
 18 liable for the misconduct alleged”). Even though a complaint does not need “detailed factual
 19 allegations” to pass muster under 12(b)(6) consideration, the factual allegations “must be
 20 enough to raise a right to relief above the speculative level . . . on the assumption that all the
 21 allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127
 22 S.Ct. at 1965. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the
 23 elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949. “Nor
 24 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual
 25 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

26 If the court grants a motion to dismiss a complaint, it must then decide whether to grant
 27 leave to amend. The court should “freely give” leave to amend when there is no “undue delay,
 28 bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party

1 by virtue of allowance of the amendment, [or] futility of amendment." Fed. R. Civ. P. 15(a)(2);
 2 *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Generally,
 3 leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be
 4 cured by amendment. See *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir.
 5 1992).

6 DISCUSSION

7 In its renewed motion to dismiss, FHR seeks to dismiss all claims against it and to
 8 dismiss the fourth cause of action for Title VII discrimination for failure to exhaust
 9 administrative remedies. (Renewed Mot. to Dismiss (#11) at 1). FHR argues that it must be
 10 dismissed from the case because the FAC does not allege that Plaintiff was employed by
 11 FHR. (*Id.* at 3). FHR asserts that GEN was Plaintiff's employer. (*Id.*). FHR asserts that it is
 12 the sole member of GEN but that GEN maintains a separate legal existence from FHR. (*Id.*
 13 at 4). FHR contends that there is nothing in the FAC that would pass GEN's liability, if any,
 14 to FHR. (*Id.*). FHR also asserts that Plaintiff failed to file a charge with the Equal Employment
 15 Opportunity Commission ("EEOC") or NERC within 300 days of his termination under Title VII
 16 and, thus, he failed to exhaust his administrative remedies and is barred from filing this claim.
 17 (*Id.*).

18 In support of the motion to dismiss, FHR attaches the declaration of Mark Miller, FHR's
 19 Chief Operating Officer. (Miller Decl. (#11) at 9). Miller declared the following. (*Id.*). FHR was
 20 a Delaware corporation licensed to do business in Nevada. (*Id.*). There is no entity named
 21 "Grand Lodge-Full Resorts, Inc." or "Grand Lodge/Full House Resorts." (*Id.*). FHR was the
 22 sole member of Gaming Entertainment (Nevada) LLC ("GEN"). (*Id.*). GEN, which did
 23 business as Grand Lodge Casino, maintained a separate legal existence from FHR. (*Id.*). At
 24 all relevant times, GEN was Plaintiff's employer. (*Id.*). FHR never employed Plaintiff. (*Id.*).

25 FHR also attached a copy of Plaintiff's NERC charge of discrimination. (Charge of
 26 Discrimination (#11) at 11). In his charge of discrimination, Plaintiff named his employer as
 27 "Grand Lodge Casino/Full House Resorts, Inc." and alleged age discrimination only. (*Id.*).

28 In response, Plaintiff filed a notice of voluntary dismissal of his fourth cause of action

1 for Title VII discrimination without prejudice. (Notice of Voluntary Dismissal (#14) at 1).
2 Plaintiff argues that FHR “may be liable for [Plaintiff’s] wrongful termination under a joint
3 employment theory of liability.” (Resp. to Renewed Mot. to Dismiss (#15) at 2). Plaintiff
4 argues that FHR is his employer because his right to sue letter states that he could sue “Grand
5 Lodge Casino-Full House Resorts, Inc.” (*Id.* at 3). Plaintiff argues that FHR is likely his joint
6 employer and lists 16 factors that are considered in making that determination. (*Id.* at 3-4).
7 Plaintiff admits that GEN paid him for his work and was his employer but asserts that FHR
8 managed the workplace. (*Id.* at 4). Plaintiff seeks leave to amend the complaint. (*Id.*).

9 In reply, FHR asserts that Plaintiff makes unsupported, conclusory allegations that FHR
10 and GEN were Plaintiff’s joint employers. (Reply to Renewed Mot. to Dismiss (#16) at 1).
11 FHR asserts that the Ninth Circuit uses the economic realities test to determine whether there
12 was a joint employer relationship and notes that Plaintiff cannot satisfy any of the factors to
13 establish a joint employer. (*Id.* at 2-3). FHR acknowledges that Plaintiff voluntarily withdrew
14 the fourth cause of action and notes that the Court no longer need to consider its request to
15 dismiss it. (*Id.* at 2 n.1).

16 As an initial matter, the Court finds that FHR’s renewed motion to dismiss the fourth
17 cause of action against all Defendants is denied as moot in light of Plaintiff’s voluntary
18 dismissal of that claim.

19 With respect to the joint employer issue, the parties acknowledge that GEN admits that
20 it was Plaintiff’s employer. Thus, if FHR was not Plaintiff’s employer it should be dismissed
21 from this case. In his response to the renewed motion to dismiss, Plaintiff attempts to keep
22 FHR in the case by alleging that FHR is a joint employer with GEN. Plaintiff acknowledges
23 that there are 16 factors that he must apply to establish that FHR is a joint employer. (See
24 Resp. to Mot. to Dismiss (#15) at 3-4). However, Plaintiff does not attempt to allege how these
25 factors apply to FHR and GEN other than to say that GEN paid Plaintiff and was Plaintiff’s
26 employer but FHR managed Plaintiff’s workplace. The Court finds that this is insufficient to
27 allege that GEN and FHR were joint employers. As such, the Court grants FHR’s motion to
28 dismiss all claims against it because Plaintiff fails to sufficiently allege that FHR was his

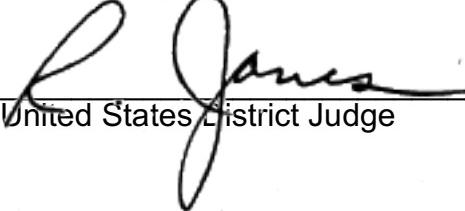
1 employer. However, the Court grants Plaintiff leave to amend. Plaintiff has 20 days from the
2 date of this order to file a second amended complaint. Accordingly, FHR's renewed motion
3 to dismiss is DENIED as MOOT in part and GRANTED in part.

4 **CONCLUSION**

5 For the foregoing reasons, IT IS ORDERED that Defendant Full House Resorts, Inc.'s
6 Motion to Dismiss Plaintiff's Complaint (#4) is DENIED as MOOT.

7 IT IS FURTHER ORDERED that Full House Resorts, Inc.'s Renewed Motion to Dismiss
8 Defendant Full House Resorts, Inc. and Plaintiff's Fourth Claim for Relief (#11) is DENIED as
9 MOOT in part and GRANTED in part. The Court DENIES as MOOT the motion to dismiss the
10 fourth cause of action in light of Plaintiff's voluntary dismissal (#14) of that claim. The Court
11 GRANTS Defendant Full House Resorts, Inc.'s motion to dismiss with leave to amend.
12 Plaintiff has 20 days from the date of this order to file a second amended complaint.

13 Dated this 16th day of December, 2013.

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United States District Judge
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